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Susan Tarwater

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To: FCC
From: Susan Tarwater
Date: May 6, 1997
RE: Comments - FCC Auction Proposal
WT Docket No 97-81

I. The Commission Does Not Have the Statutory Authority to Conduct Auctions to Assign MAS Licenses for Which Applications Were Filed Prior to July 26, 1993.

The Commission is legally obligated to conduct a lottery for any MAS license for which applications were filed prior to July 26, 1993. Congress expressly granted the FCC permission to conduct lotteries -- not auctions -- for applications on file prior to July 26, 1993. The "Budget Act" directly addressed the issue of retroactivity. The Senate Amendment to this legislation expressly stated that auctions should apply only to the granting of new spectrum licenses, and "should not...alter existing spectrum allocation procedures." Ultimately, Congress included express permission to continue using lotteries for prior filed applications. The Commission has chosen to conduct lotteries both for IVDS licenses and cellular licenses for "unserved" areas where applications for those licenses were on file before July 26, 1993. Similarly, the Commission is required to conduct lotteries for all MAS licenses for which applications were on file prior to the Budget Act's passage.

II. Fairness Considerations Require Lotteries for the MAS Licenses For Which Applications Were Filed Prior to July 26, 1993.

Even if the Commission does not acknowledge its legal obligation, fairness and public interest considerations demand that the Commission conduct lotteries for all MAS licenses for which applications were filed prior to July 26, 1993. First, the applications for the MAS licenses were filed in January and February of 1992, a year and a half before the Budget Act was adopted by Congress. Thus, these applicants could not have foreseen the enactment of the auction legislation prior to the Commission holding lotteries or have anticipated that their licenses might someday be subject to competitive bidding. By January 1993, (a year after the applications were filed)

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the applications should have been processed and the lottery held under normal lottery processing.

The substantial resources expended prior to filing my application, including design of a business plan to account for the administrative and start-up costs associated with the lottery process, pre-lottery legal and engineering support and filing fees would be rendered worthless if the Commission auctions these licenses.

Also, if implemented, auctions would require me to purchase the spectrum. As a small business owner, I would be financially unable to bid for a spectrum for which I paid to file five years ago. This is an unfair and unreasonable retroactive change in policy.

Finally, if the Commission implements auctions and reopens the application process for the same MAS spectrum this would confer an unfair benefit upon any new applicants. The Commission's original Public Notice concerning filings for these MAS licenses put all prospective applicants on notice that if we did not file during the filing windows, we would be excluded from the assignment proceedings. Accordingly, those who did not file during the filing windows were unable to participate in the anticipated MAS lotteries. Those of us who were timely filers and diligently complied with the Commission's requirements have an equitable interest in the enforcement of these rules and the Commission cannot change its rules to our detriment. We filed applications in conformance with the rules over five years ago.

That five year delay has already resulted in lost market opportunities, not to mention that the investment already expended by the original applicants has been tied up all this time. To retroactively change the rules from lottery to auction, dismiss the original applications, and provide an application opportunity to newcomers, would be the sort of gross injustice that the Court of Appeals found so repulsive in *McElroy I* and *McElroy II*. (Page 8 Comments of Fisher Wayland Cooper Leader & Zaragoza L.L.P.)

III. Factors Cited by the Commission in Favor of Auctions Do Not Withstand Analysis

A. Holding Lotteries in This Case is Administratively Simpler Than Holding Auctions.

Having processed all the pending applications and developed a lottery list, if the Commission decides to use lotteries, it could issue a public notice in a matter of days and hold the lottery 60 days thereafter.

On the other hand, dealing with 50,000 unfairly "dismissed" applicants would be daunting. The similarities of the MAS proceeding to *McElroy I* and *McElroy II* make for a very compelling court case.

B. The Changes to the MAS Service Rules Do Not Mandate Auctions

As an applicant for an MAS License, I do not object to the Commission changing from site specific licensing to geographic licensing. I would be prepared to offer more and different services as they are permitted by the Commission. Simply take my pending application and assign them to the geographic area of each master transmitter site for the purposes of lottery. Alternatively, I do not object to the Commission holding a lottery and issuing licenses on a site-by-site basis.

C. Those With Pending Applications Had No Reason to Apply For Other Spectrum

How can the Commission blame us (the applicants) for their unreasonable delay in holding the lotteries? I did not apply for other spectrum because I fully expected the Commission to hold lotteries for the spectrum for which my applications were filed. Once the Commission completed processing the applications, four and a half years ago, there was no excuse for its failure to hold the lotteries. For the Commission to blame us (the applicants) for not applying for other spectrum while we were patiently waiting for the Commission to hold a lottery that the Commission said it would hold is an exercise in "newthink" that George Orwell would be proud of.

IV If the Commission Dismisses the Pending Applications and Holds Auctions, It Must Return All Filing Fees to the Applicants

More than five years ago, in addition to our FCC filing fees, we (the applicants) spent considerable amounts on legal and engineering costs for the preparation of our applications. All this money was spent in reliance on the Commission's Public Notice announcing the MAS filing windows. If the Commission were a private enterprise, we (the applicants) would be able to sue the Commission for fraud, and we would be able to recover filing fees, application preparation expenses, cost of money over five years, and compensation for lost business opportunities, not to mention punitive damages.

Conclusion

I am wholeheartedly opposed to the dismissal of my pending applications. The way that this situation has been handled by the Commission is fundamentally unfair. The five year delay can never be

remedied. The lost business opportunities are gone. We have been damaged. To compound this by dismissing our applications in favor of new applicants would be unconscionable. The lack of convincing argument to the contrary, the Commission should rule that a lottery remains the appropriate means of assignment for the over 50,000 pending applications for MAS licenses.

Respectfully submitted,

MAS Applicant


Susan Tarwater